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the policy, but in no event should he dispose of the proceeds by will. The testator did not designate another beneficiary. The beneficiaries under these three policies were also the legatees and devisees of the remaining two-thirds of testator's estate, and elected to take under his will.

*Held:* The testator intended to give to the legatee first above mentioned one-third of all four of his life-policies.

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**JAMMISON BY &C. V. CHESAPEAKE & OHIO RAILWAY Co.**—Decided at Richmond, December 5, 1895.—*Keith, P:*

1. **RAILROADS**—*Failure to stop train—duty of passenger—falling from a running train—contributory negligence.* If a passenger train fails to stop at a station to which a passenger has purchased a ticket, it is the duty of the passenger to retain his seat until he arrives at the next station at which the train stops; and, if he feels aggrieved, to institute his action against the company for any loss or injury he may have sustained by reason of the failure to stop the train at the proper station. But if he fails to do this, and in passing from one coach to another in search of the conductor to get him to stop the train, he is thrown from the train and injured, his negligence is the proximate cause of the injury and he cannot recover damages of the company therefor.

2. **EVIDENCE**—*Declarations—admissions—res gestæ.* Under the evidence in this case the declarations of the conductor of the train, made shortly after the accident happened to the passenger, as to where he was when the accident occurred, are not admissible in evidence to bind the company. They are not competent as admissions for want of authority to make them, nor as part of the *res gestæ*, because not sufficiently connected with the accident in point of time and circumstance; and in no event does their exclusion constitute reversible error, as the declarations are not certified so that the appellate court can judge of their relevancy and value.

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**BARNES V. COMMONWEALTH.**—**ABERNATHY V. COMMONWEALTH.**—

**MARABLE V. COMMONWEALTH.**—Decided at Richmond, December 12, 1895.  
*Buchanan, J:*

1. **RECORDS**—*Amendments during the term and after.* During the term of a court at which a judicial act is done the record remains in the breast of the court, and may be altered or amended; but after the adjournment of the term, amendments can only be made in cases in which there is something in the record by which they can be safely made. Amendments cannot be made after the term upon the individual recollection of the judge, or upon proofs *aliunde*.

2. **APPELLATE COURT**—*Objection not made in trial court—jurors.* An objection that jurors summoned in a criminal case were not free from exception cannot be made in the appellate court, where it does not appear that the objection was made in the trial court, or that the accused was injured thereby. Acts 1893-'4, Ch. 43.

3. **CRIMINAL PROCEDURE**—*Joint indictment—separate trial—presumption when record silent.* Persons jointly indicted cannot be tried jointly without the concurrent election of themselves and the attorney for the Commonwealth. Either has the right to demand a separate trial. But even if it were otherwise, and the

record is silent on the subject of election, the appellate court will not presume that any right has been denied the accused.

4. APPELLATE COURT—*Record of trial court—failure to disclose error.* The Court of Appeals can only consider a case, on writ of error or appeal, on the record as made in the trial court. If this fails to disclose the errors complained of, they cannot be considered.

5. CRIMINAL LAW—*Right to have counsel—silence of record—presumption.* Every person accused of crime has a Constitutional right to have counsel to aid him in his defence, but no one is compelled to employ counsel. If the record fails to show whether the accused had counsel or not, or even if it shows that he did not have counsel, it is not ground for reversal, unless it further appears that the right to have counsel was denied. It is not to be presumed that the right was denied.

6. CRIMINAL LAW—*Custody of the jury—what record must show.* In a prosecution for a felony where the punishment may be death or confinement in the penitentiary for more than ten years, the jury must be kept in the custody of the sheriff, or other proper officer, when not in the presence of the court; and that they were so kept must affirmatively appear from the record, or the verdict and judgment will be set aside.

*Riely, J.*, dissents on the last proposition.

#### NORFOLK & WESTERN RAILROAD CO. V. DOUGHERTY AND WIFE.—

Decided at Richmond, December 12, 1895.—*Harrison, J.*:

1. SEPARATE ESTATES—*Damages for personal injuries—how suit brought.* Sec. 2284 of the Code makes damages for a wrong sustained by a married woman her separate estate, and an action therefor must be maintained in her name alone. It is error to unite the husband as co-plaintiff in such action. The Act of Assembly approved February 27, 1894 (Acts 1893-4, p. 489), permitting abatements where there has been a misjoinder of parties, plaintiff or defendant, does not apply to actions or suits decided before that date.

#### SEABOARD & ROANOKE RAILROAD CO. V. JOYNER'S ADMR.—Decided

at Richmond, December 12, 1895.—*Keith, P.*:

1. RAILROADS—*Personal injury—sufficiency of declaration—case at bar.* A declaration which charges that the plaintiff's intestate walked down the track of defendant railroad company a distance of three hundred yards, stopped and sat down on the track, in plain view of a station of the defendant, at which one of its engines and trains was standing; that the defendant negligently ran its engine and train upon the body of the intestate, being constantly in view from the time it left the station till it struck him; that intestate was clearly and plainly within seeing distance of the employees in charge of the train; that the intestate was struck a fatal blow by said train, from which he died; and that his death was caused by the wrongful act of defendant company, states a proper case for recovery by the plaintiff.

2. RAILROADS—*Personal injuries—contributory negligence—duty to trespassers.* In an action to recover damages for a personal injury inflicted by a railroad company, although the plaintiff may have been guilty of negligence which contributed to the accident, he is, nevertheless, entitled to recover, if after discovering his peril